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No. 00-223

Supreme Court, U.S.
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In The

Supreme Court of the United States

JENNY BURNETT,

Petitioner,

v.

TYCO CORPORATION, GRINNELL CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS TYCO CORPORATION, GRINNELL CORPORATION IN OPPOSITION

MICHAEL G. MCLAREN
Counsel of Record
VICKIE HARDY JONES
Attorneys for Respondents
530 Oak Court Drive, Suite 310
Memphis, Tennessee 38117
(901) 762-0535

CHERYL RUMAGE ESTES
Attorney for Respondents
2900 One Commerce Square
40 South Main Street
Memphis, Tennessee 38103
(901) 525-8721

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the district court and the United States Court of Appeals for the Sixth Circuit correctly found that the facts presented by Petitioner were not sufficiently severe or pervasive to meet the objective element of a sexually hostile environment under Title VII, 42 U.S.C. 2000e, et seq.?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

ARGUMENT 3

CONCLUSION 6

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Abeita v. TransAmerica Mailings, Inc., 159 F.3d 246 (6th Cir. 1998) 3

Harris v. Forklift Systems, 510 U.S. 17 (1993) 3

Mendoza v. Borden, Inc., 158 F.3d 1171 (11th Cir. 1998), *vacated*, 169 F.3d 1378 (11th Cir. 1999), *reh'g granted*, 195 F.3d 1238 (11th Cir. 1999) 5

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) 3

Williams v. General Motors Corp., 187 F.3d 553 (6th Cir. 1999) 4, 5

FEDERAL STATUTES

42 U.S.C. 2000e. 1

STATEMENT OF THE CASE

The issue before the district court in this case was whether the facts presented by Petitioner, examined in the light most favorable to Petitioner, were sufficiently severe or pervasive to meet the objective element of a sexually hostile environment under Title VII, 42 U.S.C. 2000e, et seq. Respondents offer the following as a correct account of the pertinent facts:

Petitioner was employed by Respondent Grinnell for over 19 years at the time of the filing of the complaint which initiated this action. She worked with Jim Phillips, the alleged harasser, for more than fifteen years. Petitioner alleged the following incidents which she contended rose to the level of a hostile work environment:

> In approximately July 1994, members of the packing department at Respondent Grinnell, which included Petitioner, gathered for a meeting. R. 30, Defendant's Memoranda in Support of Motion for Summary Judgment, with Attachments. Phillips entered the room and, while waiting for the meeting to begin, told a story about a woman he had seen recently. As he told the story, Phillips allegedly picked up a pack of cigarettes, reached over, and placed the pack under the straps of Petitioner's tank top and brassiere. During her discovery deposition, Petitioner testified that Phillips pulled her brassiere strap away from her body only far enough to fit in the cigarette pack and that her body was not exposed by this action any more than if she had leaned over while wearing the tank top. R. 30, Defendant's Memoranda in Support of Motion for Summary Judgment, with Attachments.

> During a subsequent departmental meeting, Phillips gave Petitioner a piece of cherry candy, allegedly saying, "since you have lost your cherry, here is one to replace the one you lost."
>
> Finally, approximately six months later, Petitioner was wearing a holiday sweat shirt imprinted with the slogan "Deck the Malls." Phillips approached Petitioner and allegedly said, "Dick the Malls, Dick the Malls, I almost got aroused." R. 30, Defendant's Memoranda in Support of Motion for Summary Judgment, with Attachments.

Petitioner admitted during her discovery deposition that the incidents described above occurred over the course of a six-month period of time and were the only incidents of alleged sexual harassment that occurred. She further admitted that she never reported this conduct to any managerial person at Respondent Grinnell, electing instead to file a charge with the EEOC.

In her discovery deposition, Petitioner admitted that no further incidents of alleged sexual harassment have occurred since the filing of her charge with the EEOC. R. 30, Defendant's Memoranda in Support of Motion for Summary Judgment, with Attachments. To date, Petitioner continues to work for Respondent Grinnell. There have been no changes in her job duties, she has received pay increases, and she is performing the same work that she performed prior to the alleged occurrence of the three incidents described above. R. 30, Defendant's Memoranda in Support of Motion for Summary Judgment, with Attachments.

ARGUMENT

I. The decision of the United States Court of Appeals for the Sixth Circuit does not conflict with prior decisions of this Court.

Petitioner claims that the Sixth Circuit Court of Appeal's decision in this case conflicts with the opinions of this Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) and *Harris v. Forklift Systems*, 510 U.S. 17 (1993). As noted by Petitioner, in each of the aforementioned opinions, this Court found that harassment is actionable if it is either severe or pervasive, with no requirement that the harassment be both.

Contrary to Petitioner's argument, the Sixth Circuit in this case found against Petitioner because the alleged conduct was neither severe nor pervasive enough to sustain a claim for hostile work environment. The Sixth Circuit found as follows: "We affirm the grant of summary judgment because the allegations do not create a genuine issue of material fact as to whether the conduct was sufficiently severe *or* pervasive to support a finding of a hostile working environment." (emphasis added). The Sixth Circuit found that the alleged harassment was *neither* severe nor pervasive. The Sixth Circuit did not require that the alleged harassment be both, but found it to be neither.

In considering whether the alleged harassment of which Petitioner complained was pervasive, the Sixth Circuit noted that Petitioner did not allege that Phillips' conduct was "commonplace, ongoing, or continuing" as required by the holding in *Abeita v. TransAmerica Mailings, Inc.*, 159 F.3d 246 (6th Cir. 1998). Rather, Petitioner

acknowledged that the incidents of which she complained were limited to three instances that occurred over the course of a six-month period of time. As such, the Sixth Circuit found that the conduct in this case was not sufficiently pervasive to create a hostile work environment.

In examining the severity of the alleged harassment, the Sixth Circuit acknowledged that the cigarette pack incident was fairly severe and may have constituted a battery. However, the Sixth Circuit properly found that a single battery, coupled with two merely offensive remarks over a six-month period, did not create an issue of material fact as to whether the conduct alleged was sufficiently severe to create a hostile work environment. Thus, the Sixth Circuit found that the alleged harassment was not actionable due to its severity.

Having found that the alleged harassment was not actionable due to its pervasiveness *or* severity, the Sixth Circuit properly affirmed the District Court's grant of summary judgment.

II. The decision of the United States Court of Appeals for the Sixth Circuit in this case does not conflict with prior decisions of the Sixth Circuit.

Petitioner claims that the Sixth Circuit's decision in this case conflicts with the prior decision of the Sixth Circuit in *Williams v. General Motors Corp.*, 187 F.3d 553 (6th Cir. 1999). In fact, the Sixth Circuit relied on the *Williams* case in reaching its decision in this case, citing it for the proposition that "it is well-established that the court must consider the totality of the circumstances."

The Sixth Circuit applied the analysis required by its decision in *Williams* and concluded that " . . . *under the totality of the circumstances,* a single battery coupled with two merely offensive remarks over a six-month period does not create an issue of material fact as to whether the conduct alleged was sufficiently severe to create a hostile work environment." (emphasis added). There is no conflict between the *Williams* decision and the decision reached by the Sixth Circuit in this case.

Petitioner relies on the case of *Mendoza v. Borden, Inc.*, 158 F.3d 1171 (11th Cir. 1998), for the proposition that a "hostile work environment is a single cause of action, not the sum total of a number of causes examined in a vacuum." *See* Petition for Writ of Certiorari, 4. It should be noted that the opinion of the Eleventh Circuit panel cited by Petitioner was vacated by the Eleventh Circuit at 169 F.3d 1378 (11th Cir. 1999). Following a hearing *en banc,* the Eleventh Circuit found that the district court did not err in granting a motion for a judgment as a matter of law on the plaintiff's sexual harassment claim, as the conduct established by the plaintiff was not sufficiently severe or pervasive to alter the terms or conditions of her employment. *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1242, 1251 (11th Cir. 1999). Like the plaintiff in Mendoza, the terms and conditions of Petitioner's employment were not altered by the alleged harassment. Following the occurrence of the alleged harassment, Petitioner continued to work for Respondent Grinnell, had no changes in her job duties, received pay increases, and performed the same work that she performed prior to the alleged occurrence of the three incidents described above. R. 30, Defendant's

Memoranda in Support of Motion for Summary Judgment, with Attachments.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL G. MCLAREN
Counsel of Record
VICKIE HARDY JONES
Attorneys for Respondents
530 Oak Court Drive, Suite 310
Memphis, Tennessee 38117
(901) 762-0535

CHERYL RUMAGE ESTES
Attorney for Respondents
2900 One Commerce Square
40 South Main Street
Memphis, Tennessee 38103
(901) 525-8721